

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0606, State of New Hampshire v. Randy Owen, the court on July 8, 2005, issued the following order:

Following a jury trial, the defendant, Randy Owen, was convicted of second degree assault. On appeal he contends that the trial court erred in denying his motion for mistrial. We affirm.

“Mistrial is the proper remedy only if the evidence or comment complained of was not merely improper, but also so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions.” State v. Hearn, 151 N.H. 226, 232 (2004) (quotation omitted). The trial court is in the best position to determine what remedy will adequately correct any prejudice caused by a prosecutor’s remarks; absent an unsustainable exercise of discretion, we will not overturn its decision. *Id.* In this case, because defense counsel withdrew his request for a curative instruction, the sole issue before us is whether the prosecutor’s statement was so prejudicial that a mistrial was required.

We will assume without deciding that the defendant has preserved his constitutional claims and that the prosecutor’s comment was improper. Based upon the record before us, we find no evidence of an irreparable injustice. The prosecutor’s comment was isolated and offered in response to the defendant’s closing argument. The trial court instructed the jury that they were to decide the case only upon the evidence presented, that they were not to consider the arguments of trial counsel as evidence and that the defendant had a right not to testify. Moreover, we conclude that an immediate curative instruction would have cured any prejudicial effect created by the prosecutor’s comment. By withdrawing his request for a curative instruction, the defendant waived his right to argue that the comment caused him unfair prejudice. *See State v. Roubo*, 140 N.H. 409, 413 (1995).

Finally, the evidence of the defendant’s guilt was overwhelming. The jury heard testimony from the victim and other witnesses that the defendant hit the victim on the side of his head causing the victim to fall and hit his head on a metal stanchion. Several witnesses testified that the victim was knocked unconscious. The jury also heard testimony from the victim and his treating physicians about the victim’s injury and its continuing effects.

Given the record in this case, we cannot conclude that the trial court engaged in an unsustainable exercise of discretion in denying the defendant's motion for mistrial.

Affirmed.

NADEAU, DALIANIS and GALWAY, JJ., concurred.

Eileen Fox
Clerk